APR 4 1975

In the Supreme Court of the United States

_____ TERM

NO. 74-1262

DANIEL CHIARITO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

HORTON, PERSE & GINSBERG
and
HIGHSMITH, STRAUSS & NELSON
410 Concord Building
Miami, Florida 33130
Attorneys for Petitioner

MIAMI REVIEW — 371-4853 — 377-3721

INDEX

	Page
OPINION BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2, 3
CONSTITUTIONAL PROVISION INVOLVED	3
STATEMENT OF THE CASE	3-9
REASONS FOR GRANTING THE WRIT	10-17
CONCLUSION	18
APPENDIX	App. 1-6
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

Case	Page
Shorter v. United States, 469 F.2d 61 (9 Cir. 1972)	11
United States v. Johnson, 425 F.2d 630 (9 Cir. 1970)	11
United States v. Price, 472 F.2d 573 (9 Cir. 1973)	11

CONSTITUTIONAL PROVISIONS

Constitution, United States, Amendment IV	3

in the
Supreme Court
of the
United States

_____ TERM

NO. _____

DANIEL CHIARITO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

The petitioner, DANIEL CHIARITO, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on February 6, 1975, petition for rehearing denied on March 6, 1975.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported, *Chiarito v. United States of America*, 507 F.2d 1098 (5th Circuit Court of Appeals, Case No. 74-2951) and appears with the denial of the petition for rehearing as appendices A and B.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was made and entered on February 6, 1975. The jurisdiction of this Court is invoked under Title 28, U.S.C. 1254(1) and Rule 19, United States Supreme Court Rules. The relevant statutes involved are 19 U.S.C. 482; 21 U.S.C. 952(a) and 21 U.S.C. 841(a)(1).

The judgment of the United States Court of Appeals for the Fifth Circuit (a) is in conflict with another Court of Appeals on substantially the same matter; and (b) presents a decision on an important question of federal law which has not been, but should be, ultimately settled by this Court as a substantial erosion is occurring in the guidelines under which the scope of border searches are presently being conducted. Therefore, the jurisdiction of this Court is respectfully invoked.

QUESTION PRESENTED

WHETHER THE PETITIONER'S CONSTITUTIONAL RIGHT TO REMAIN SECURE IN HIS PERSON WAS VIOLATED BY AN ILLEGAL SEARCH AND SEIZURE PREDICATED SOLELY ON SUSPICION—THE SCOPE OF THE SEARCH NOT BEING RELATED TO THE JUSTIFICATION FOR ITS INITIATION—AND THE FRUITS OF THE SEARCH NOT SUPPLYING ANY REASONABLENESS UPON WHICH IT WAS CONDUCTED.

CONSTITUTIONAL PROVISION INVOLVED

FOURTH AMENDMENT FOR SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .

STATEMENT OF THE CASE

The instant cause commenced with the filing of an indictment on April 11, 1974, in which the United States government charged the petitioner with the illegal importation of cocaine and the illegal possession of cocaine with the intent to distribute same. The petitioner pleaded not guilty and the cause came on for trial. It was stipulated between the parties that the evidence and testimony on the petitioner's motion to suppress would be evidence at the non-jury trial.

At the hearing of the motion to suppress, Gilbert Payette testified that he was working the evening shift plain clothes detail as a customs patrol officer (CPO) on the date of the search of the petitioner. Mr. Payette stated that CPO's work at the customs enclosure from the entrance through immigration to the exit, mingling with incoming passengers to observe as they moved through inspection. The procedure followed was described by Mr. Payette as allowing a passenger to come through with his luggage placed upon the carousel, the luggage then being removed by the passenger and examined by a customs inspector; if nothing is found, the customs inspector makes a notation on the passenger's declaration card, and the passenger is allowed to leave, depositing the card with the CPO at the exit. The codes entered on the declaration cards by customs inspectors include the letter "S" which indicates that the individual has passed through a secondary examination, to wit, his baggage has been examined.

Mr. Payette further stated that the customs inspector who receives the declaration card and who looks through the luggage can signal by light indicator for further (secondary) searches of those individuals who arouse his suspicion, and that, also, if the inspector noticed anything unusual, he would signal another customs inspector to conduct an additional secondary search.

U.S. Customs Inspector Alfred Keen, who had inspected the petitioner's luggage, testified that he did not notice anything unusual about the petitioner other than he seemed a little nervous, but, that every passenger acted differently and that he had seen many nervous individuals going through customs. Mr. Keen stated that he did not signal anyone concerning the petitioner's conduct and that

the code on the petitioner's declaration card had been placed there by another inspector. Mr. Keen testified that his inspection of the petitioner's luggage did not produce anything unusual, nor was the petitioner's appearance especially "bulky."

CPO Payette stated that none of the signals used by the customs inspectors had been received and that he had first observed the petitioner at the time the petitioner came into the customs enclosure. Mr. Payette testified that at that juncture he had received no information concerning the smuggling of contraband by anyone who fit the petitioner's description and that he was not particularly looking for someone of the petitioner's description. Mr. Payette stated his interest was aroused when he first saw the petitioner because he seemed nervous and isolated, and because he seemed to stand out by himself. However, Mr. Payette had seen other passengers come through customs alone. Mr. Payette felt that the petitioner's being alone was sufficient, in and of itself, to arouse his interest and he, therefore, kept the petitioner under surveillance. During this surveillance, Mr. Payette thought the petitioner seemed excessively conscious of himself, although not physically nervous. In addition, Mr. Payette stated he observed that the petitioner was wearing a three-piece suit which was somewhat bulky around the vest area.

Mr. Payette stated that he saw the petitioner present his luggage and his declaration card to the inspector at the luggage carousel and, subsequently, proceed without interruption through customs. When he saw the petitioner again, Mr. Payette noticed that he was next to a porter

who had the petitioner's luggage on a cart, the petitioner then being about to present his declaration card to the agent at the exit.

Up to this time, no further matters which were suspicious or unusual were observed or disclosed. Mr. Payette walked up to the petitioner and asked to see his passport and declaration card. Mr. Payette stated that he was according the petitioner a secondary examination because of the bulkiness and stiffness which Mr. Payette thought he saw in petitioner's vest and because of his opinion as to the petitioner's nervousness which had been noted prior to the first inspection. The petitioner was not advised that he was under arrest or that he was under suspicion, but, in fact, he was in custody.

At this time, Mr. Payette requested that an associate check the petitioner's name through the customs computer for violations and that the check came back negative. In fact, Mr. Payette was notified as to this negative finding *prior to* the secondary search.

Mr. Payette stated that up to that time, the only suspicion that he had was concerning cameras that the petitioner had around his neck, and that the cameras might have been subject to duty. At no time (even after the arrest) were the cameras inspected.

Mr. Payette responded to direct examination by defense counsel as follows:

> "Q. And all the behavior patterns that you have testified to about Mr. Chiarito—what was it pertaining to those behavior patterns—what

was the purpose of observing Mr. Chiarito and those behavior patterns? What was your purpose?

"A. Not just with him specifically, but everyone that comes in—I keep those things in mind as well as other things, to enforce the customs laws and the related laws.

"Q. Did you at the time that you took Mr. Chiarito into custody suspect that he had any merchandise subject to duty on his person?

"A. Possibly his cameras.

"Q. His cameras, did you say?

"A. Yes.

"Q. Did you have an opportunity to inspect his cameras while they were on the customs inspector conveyor belt?

"A. No.

"Q. Did you tell Mr. Chiarito at this point, 'I suspect your cameras are subject to duty?'

"A. No.

"Q. Did you tell that to anyone other than me here today?

"A. No.

"Q. Is it in any of your reports?

"A. No, it's just something I consider.

* * *

"Q. Did you at this time [prior to commencing the secondary search] suspect Mr. Chiarito had

violated any of the laws pertaining to the importation of merchandise which is subject to duty or contrary to any other laws of the United States that you have a duty to enforce?

"A. Not directly, no."

Mr. Payette then escorted the petitioner to the examination room of the customs enclosure and engaged the petitioner in light, friendly conversation which did not enhance Mr. Payette's suspicions. Mr. Payette determined that the petitioner was travelling from Columbia to Chicago and did not at this time suspect the petitioner of bringing in narcotics.

The petitioner was brought into an interview room and both he and Mr. Payette sat down and began completing forms as is required of customs officials when they make secondary inspections. Mr. Payette asked the petitioner to empty his pockets in that he was interested in the bulky appearance of same. After the contents of the petitioner's pockets were taken out, the inspector stated that "nothing specifically related to the thing he was interested in was found."

The inspector then *continued* to look through the defendant's wallet for *uncut stones* and found nothing which developed further suspicions. Thereupon, although he had no further suspicions, Mr. Payette decided to do a "pat down" search of the petitioner.

In the "pat down" search, the inspector testified that he "felt something in the watch pocket he could not iden-

tify." At this time, he testified that he did not have a reasonable suspicion that the petitioner had violated any of the laws of the United States.

When he felt the object in the petitioner's watch pocket, Mr. Payette asked him to remove the object which was determined to be a dollar bill in a paper fold, the dollar bill being folded in the manner done by jewelers to keep uncut gems, and being neatly folded and flat. Mr. Payette stated that when the dollar bill was unwrapped, he found a small quantity of a white substance which was later determined to be cocaine. At this time, the petitioner was advised of his constitutional rights and a field test was performed and determined to be positive for cocaine.

Thereupon, the petitioner was given a "skin" search and his effects were X-rayed, whereupon, a quantity of cocaine was discovered implanted in the heels and soles of his shoes, which is, and was the substance of the charges brought against the petitioner.

The United States District Court Judge denied the petitioner's motion to suppress and, ultimately, found the petitioner guilty as charged.

The petitioner timely prosecuted his appeal to the United States Court of Appeals for the Fifth Circuit which affirmed the conviction. (Appendix A).

This petition for certiorari follows:

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEAL AND PRESENTS A SUBSTANTIAL FEDERAL QUESTION AS TO THE BASIC CONSTITUTIONAL RIGHT TO BE SECURE IN ONE'S PERSON EVEN IN A BORDER SEARCH WHERE PROBABLE CAUSE IS NOT REQUIRED BUT WHERE THE SCOPE OF THE SEARCH IS NOT RELATED TO THE JUSTIFICATION FOR ITS INITIATION.

The petitioner would reluctantly acknowledge, but not concede, by virtue of the overabundance of relevant cases condoning border searches that mere suspicion is sufficient to give customs agents the right to make a search at the border.

Further, no challenge has ever been successfully made attacking as the basis for such searches the constitutional requirement of "reasonableness." However, the petitioner would submit a substantial federal question is present herein, and the opinion sought to be reviewed is in conflict with others in the various circuits on the issue relating to whether or not a distinction can be, and should be, made between the government's *right to make a search* at the border and the *nature and extent* of the search that may be made under the circumstances. There seems to be a significant conflict in the circuits on this issue.

As reluctantly acknowledged above, a search of a person's baggage may be made at the border on the basis of

the merest suspicion. Indeed, such searches may be made directed to the person even on the basis of mere suspicion. However, if the search is to proceed to the ultimate—an interior body cavity search—reaching the body of the individual himself—it would seem to this petitioner that something more is, or should be, required.

If there is this requirement of "something else" (as the decisions to be discussed indicate) the petitioner should have his case reviewed on the merits because the instant record reflects nothing more than suspicion, leading to surmise, a finding of nothing during a preliminary search to which the customs officer was at all concerned about, and culminating with a search of the person.

If there is no further requirement of "something else" to justify a search of the person, then no substantial federal question is present but conflict exists with *United States v. Johnson*, 425 F.2d 630 (9 Cir. 1970); *Shorter v. United States*, 469 F.2d 61 (9 Cir. 1972); and *United States v. Price*, 472 F.2d 573 (9 Cir. 1973). These cases holding and recognizing that the validity of body searches must be predicated on a clear indication or "plain suggestion" of smuggling and the existence of mere suspicion is not enough to justify the search. The instant cause falls legally within the suspicion cases, but factually a body search was done.

The record reflects the following occurrences justifying this Court's granting of certiorari.

The agent stated that the petitioner appeared nervous and was wearing a vest suit prior to the initial search by the customs inspector. The agent testified concerning

the cameras which he said aroused his interest, but he never checked the serial numbers or asked for the customs declaration sheet that is made out on photographic equipment before an individual leaves a country, for his return.

Moreover, the customs agent had the benefit of checking the petitioner's name through the customs computer which, before he conducted the "pat down" search, informed the agent that the petitioner was neither a suspect nor an individual who had prior activity of interest to customs. Nevertheless, the agent then asked the petitioner to empty his pockets (to determine what was bulky in the vest area). The pockets were emptied; nothing was found. From this point on, the customs agent—based upon nothing further—and having his suspicions refuted on his theories of personal smuggling activity, duty owing on the camera, and suspect "gems" decided to do a "pat down" search and found, after painstaking examination, a folded-up dollar bill inside a watch pocket in the petitioner's vest suit. At the point of the "pat down" exploratory search, the customs agent was totally lacking any reasonable grounds to suspect the petitioner of any violation of any laws of the United States, and, in fact, he specifically advised the court to this effect:

> "A. I looked through the passport and wallet and in the wallet for uncut stones, the general work that I do every day.
>
> "Q. At this point did you indicate to Mr. Chiarito that you wanted a further search?
> "A. Yes, I said now something to the effect—at that time I said that I would perform a pat down of his clothing.

"Q. Up to this point did you have any additional concern other than what you have voiced here in court?

"A. No, I was still interested in the initial actions in the area that I was in."

The petitioner submits from the above facts it is clear an internal body search was *not* done. The law previously cited relates to the division between "pat downs" and "strip-searches" versus internal body searches. The distinction between the two areas of search have been legally justified and judicially validated. However, a hybrid of the two theories is now made to appear and conflict exists in this case. The United States Courts of Appeal for the various circuits have created a division between pat down searches and strip searches splitting what was once a well settled rule of law into a situation wherein the customs officers are free to pick and choose what tests apply no matter what facts they are faced with. This may best be exemplified by the following authorities.

In *United States v. Johnson*, supra, the government called two witnesses at trial. The first witness was a customs inspector who had considerable experience in examining people at the border. He testified that he observed the defendant and a companion, had talked with them, had become suspicious and had the defendant, JOHNSON, searched. Narcotics were subsequently found. The defendant was convicted. On appeal, the conviction was reversed. In so doing, the 9th Circuit stated that there were no objective, articulable facts in the record to support the inspector's "suspicion." In JOHNSON, supra, there was no internal body search, but the Court of Appeal applied

the internal body search rule, i.e., the need for objective and articulable facts. In the instant cause, the Fifth Circuit Court of Appeals applied a rule out of harmony with that found in JOHNSON, supra. In the instant cause, there was no body search done either. Yet, the Court of Appeals applied the mere suspicion test even after Mr. Payette had testified that he found no justification for his original *three* suspicions. Those suspicions were petitioner's personal conduct as a smuggler (rejected by the computer), petitioner's camera being subject to duty (said camera and duty sheet never being checked), the existence of gems in the petitioner's vest (the gems not being present after the petitioner emptied his pockets).

The petitioner's position is further strengthened by the decision in *Shorter v. United States*, supra. In that case, the Court recognized that a mere suspicion does not justify a skin search or a body cavity search; rather, a "real suspicion" supported by objective facts is necessary. In affirming the conviction, the appellate court recognized that SHORTER was not subjected to either a skin or a body search until *after* the first packet of heroin was discovered. Therefore, the appellate court found that the real suspicion test was not applicable. In the instant cause, there was absolutely no justification for proceeding to a "pat down" search when no objective and articulable facts bearing some reasonable relationship that something was concealed on the body of the petitioner was established, and Mr. Payette continued on the basis of the merest suspicion possible.

In *United States v. Price*, supra, the appellate court reversed a conviction for illegal possession of narcotics on facts substantially similar to the instant cause. In

PRICE, supra, the customs officers had no prior information about the defendant as a possible smuggler of narcotics and they did not observe any of the customary indicia of narcotics use such as needle marks, pinpointed eyes, or drug paraphernalia. To justify the search that they made, they relied on the defendant's nervousness during questioning and the presence of a "suspicious bulge" around her waist. The appellate court recognized that a bulge as described by the officers would provide the objective fact required to authorize *some inquiry*, the court concluded that it did not justify the complete strip search conducted. The court opined, "The objective, articulable facts must bear some reasonable relationship to suspicion that something is concealed on the body of the person to be searched; otherwise, the scope of the search is not related to the justification for its initiation, as it must be to meet the reasonableness standard of the Fourth Amendment." The court continued its opinion by factually recognizing that quite early in the officer's examination of the defendant, it became apparent that the suspicious bulge about the defendant's waist was not due to concealed contraband, as they had initially suspected, but rather it was simply body fat. Their hunch thus disproved, the officers should have discontinued the search. They were not entitled, on the basis of the defendant's nervousness alone, to keep looking until they found something. Such is the case before this Court. Quite early in the officer's examination of petitioner, it became apparent that the petitioner was not a smuggler of narcotics as would be gleaned from their "computer." Quite early in the officer's examination of the petitioner, it became apparent that the petitioner's camera had nothing to do and was not subject to duty. Quite early in the officer's examination of the petitioner, it became apparent that the petitioner did not have, nor

was there any indication of, gems that originally formed the basis for the customs officer's suspicions. The petitioner would submit to this Court that Mr. Payette's hunches having been disproved, the officer should have discontinued his search. He was not entitled, on the basis of the petitioner's nervousness alone, to keep looking until he found something. As the court recognized in PRICE, supra:

> "We do not measure the reasonableness of a search by its results, but by the information on which the search was conducted. Here, the specific information was of a limited nature, and could be verified by a limited search. That is all that was, therefore, justified under the Fourth Amendment; the search of appellant was, on these facts, excessive." 472 F.2d 575.

It is apparent that since the facts in PRICE, supra, never reached the stage of internal body searches, it would seem that *now* the law prescribes that there must be at least some facts "objective, articulable facts bearing some reasonable relationship that something is concealed on the body of the person to be searched prior to any search by the agents of the persons suspected." Reverting once again to the facts in PRICE, as compared to this petitioner, it would seem that in both cases once the areas of suspicion were found to be without merit, and unjustified, the search should have terminated. Obviously, the discovery of the contraband did not and could not validate the search.

If this test is applied to the petitioner, the search was patently unreasonable. The agent suspected the camera.

Nothing came to fruition. The agent suspected there were gems. Nothing came to fruition. The agent suspected the petitioner himself and ran his identity through the computer. The results were negative. The agent suspected the petitioner's vest and nothing came to fruition. By this time, *anybody* would have been increasingly nervous, would have been jittery, would have shown agitation and an increased rate of perspiration. It is this very conduct, the general exploratory search—revealing nothing upon nothing, from which the Constitution seeks to protect. Then, in the very last throes of desperation—after having his suspicions of camera, gems, and personal identification thwarted, the agent with nothing else to go on—decided a full pat down search was required. The petitioner would submit to this Court that there was no objective, nor articulable facts upon which to continue the instant search.

The petitioner would submit to this Court that an after the fact justification of what was clearly a search predicated on refuted suspicion in three areas violated the purpose and spirit of the Fourth Amendment. The petitioner believes this Court should issue its writ of certiorari, review this case on the merits, quash the opinion sought to be reviewed with directions to reverse the conviction and discharge this petitioner.

CONCLUSION

Based upon the foregoing reasons and citations of authority, the petitioner urges this Court to issue its writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

HORTON, PERSE & GINSBERG
and
HIGHSMITH, STRAUSS & NELSON
410 Concord Building
Miami, Florida 33130
Attorneys for Petitioner

By: _____
ARNOLD R. GINSBERG